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MICHAEL RODAK, J

IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 1973

No. 73-1556

WILLIAM ECHOLS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

JAMES A. BELL
ALLEN I. HARRIS
1023 North Grand
St. Louis, Missouri 63106
JEfferson 3-1776

DAYE SHINN
4676 Admiralty Way
Marina Del Rey, California
Attorneys for Petitioner

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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To the United States Court of Appeals for the Eighth Circuit

The petitioner, William Echols, respectfully, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this proceeding on or about April 20, 1973.

OPINION ATTACHED

The opinion of the Court of Appeals is reported, and appears as **United States v. Echols, F2d** Eighth Circuit April 20, 1973, attached herewith and made Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on or about April 20, 1973, but a mandate has not been issued at this time. That petitioner has filed with the Eighth Circuit Petition for Stay of Mandate appealing for application for the Supreme Court of the United States for review and that the Eighth Circuit by an order entered May 2, 1973 has denied such an application in Cause No. 72-1577, United States v. Echols. That jurisdiction of this Court is invoked under 28 USC 1254 Paragraph 1. This petitioner asks that his petition be considered by the court upon its merits since no prejudice can occur to the government by the presentation thereof and that petitioner present significant issues of importance in the law.

QUESTIONS PRESENTED

I. Where an airline makes a search pursuant to its highjacking profile, is there sufficient governmental involvement to raise Fourth Amendment prohibition against unreasonable search and seizure.

II. Where the record shows possession of drugs and is totally devoid of any evidence on the question of intent, may "intent to distribute" be inferred solely from the large amount of drugs.

STATUTES INVOLVED

18 U.S.C. Section 922 (e)

It shall be unlawful for any person knowingly to deliver or cause to be delivered to any common or contract carrier for transportation or shipment in interstate or foreign commerce, to persons other than licensed dealers, or licensed collectors, any package or other container in which there is any firearm or ammunition without written notice to the carrier that such firearm or ammunition is being transported or shipped; except that any passenger who owns or legally possesses a firearm or ammunition being transported aboard any common or contract carrier for movement with the passenger in interstate or foreign commerce may deliver said firearm or ammunition into the custody of the pilot, captain, conductor, or operator of such common or contract carrier for the duration of the trip without violating any of the provisions of this chapter.

18 U.S.C. Section 924 (a)

Whoever violates any provision of this chapter or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter, shall be fined not more than $5,000, or imprisoned not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine.

21 U.S.C. Section 841 (a) (1)

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance.

21 U.S.C. Section 844 (a)

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter . . .

STATEMENT

The defendant was charged in a three count indictment with the following: Count I, violation of Title 18, U.S. Code, Section 922 (e) and Section 924 (a) transporting firearms on a common carrier in interstate commerce; Count II, violation of title 21, U.S. Code, Section 841 (a)(1) illegal possession of cocaine with the intent to distribute; and Count III violation of Title 21, U.S. Code Section 844 (a), illegal possession of marijuana.

On March 24, 1972, a motion to suppress the evidence was heard before the Honorable H. Kenneth Wangelin, United States District Judge for the Eastern Division of the Eastern District of Missouri. At said motion the following evidence was adduced:

The first witness was Kent Tayman, who stated that he was passenger service ambassador for Transworld Airlines (TWA). That on February 2, 1972, he was working out of Los Angeles International Airport. At approximately 9:50 A.M. he was informed that a man by the name of S. Page had purchased a ticket for flight 136 to St. Louis, and that said individual had no identification. Mr. Page was pointed out to this witness and was thereafter questioned by a U. S. Marshal, William Speas. Mr. Tayman asked the individual for identification and was informed that he did not have any and must have packed the same in his luggage. Mr. Tayman asked Mr. Page for his claim check, which was promptly and politely turned over to Mr. Tayman. Mr. Tayman copied the number 761905 and returned the claim check to Mr. Page. Mr. Page was then informed that he could not board the airplane without identification. Mr. Page asked about his luggage and was informed to go to lost and found and that the luggage would either be returned to him or held for his later arrival in St. Louis. The

claim check number was then given to Mr. Dave Gentry, Director of Customer Service. Sometime later that day Mr. Tayman had a conversation with one Terry Vaughn, a TWA agent in St. Louis. Mr. Vaughn informed Mr. Tayman that the luggage in question had been moved to the lost and found for safekeeping and Mr. Tayman told Mr. Vaughn that the person previously identified as Mr. Page had purchased a second airplane ticket under the name of William Eckols and was on the way to St. Louis.

On the Government's cross-examination of the witness the following questions and answers occurred:

Q. At any time in this conversation did you ask permission of the defendant to look into his luggage.

A. No, I did not.

Q. Did he at any time give you permission to look into his luggage?

A. No (Motion p. 19).

When questioned about the function of Mr. Gentry the following answer occurred:

A. His job would be to take that information and find that piece of luggage and take it to lost and found in St. Louis for safekeeping or to follow instructions that the airlines would have given him for return or disposal (Motion pp. 21-2) (Tayman's testimony motion pp. 2-35).

The next witness on the motion to suppress was Mr. Terry Vaughn who stated that he worked in the Baggage Service Office of the St. Louis Airport and was an employee of TWA. He stated that on February 2, 1972, David Gentry, Director of Customer Service, told him that an individual had been refused boarding in Los Angeles and that because of the time problem they were unable to retrieve his bag before it left Los Angeles. The two

men then went to the claim area to find the bag. The witness stated that he discovered a bag similar in description to the one he was looking for with a strap on the handle which corresponded to the number given to him by Gentry. At this time the following TWA regulation was read into evidence: "Unclaimed baggage. Item 1: If baggage with proper destination tag is unclaimed, efforts will be made to determine ownership. A search of the contents will be made to establish possible ownership and contact" (Motion p. 46). Mr. Gentry then left on the return flight. Mr. Vaughn testified he took the luggage to the baggage service office in the airport, and once inside opened said baggage. The baggage had been locked and Mr. Vaughn stated he used a skeleton key to open it. The witness stated he laid the baggage flat and inside of the suitcase there was a small zippered compartment marked "ties", and when Mr. Vaughn unzipped this he discovered a .357 Magnum pistol and a partially filled box of ammunition. At this time Mr. Vaughn called the airport police and the United States Marshal. The marshal arrived, took the weapon and unloaded it. Then at the request of the marshal, Mr. Vaughn called Los Angeles and was informed that the man with the same description is the man who had previously been denied passage, had purchased another ticket and was on flight 194 under another name (Motion pp. 35-61).

The next witness was Robert Walker, Deputy U. S. Marshal, who stated that approximately 3:45 p.m. he received a call to go to the baggage room, and that he went there with Deputy U. S. Marshal Joseph Richwein. They were there met by Mr. Vaughn who showed them the baggage and the pistol. Thereafter, they received information that a Negro male, who fit the description of the man who had bought the ticket, would be on flight 194. They stopped a man as he deplaned and asked him if his name was "B. Eckols", and when he answered

affirmatively they arrested him. The marshals then took him to their office where they showed him the luggage and weapon which he identified as his. The defendant was then transported to the St. Louis County jail and later taken to the U. S. Marshal's office in the Federal Courthouse to be processed (Motion pp. 62-71).

The next witness, John J. McCue, who stated that he was a Deputy U. S. Marshal. He stated that on the day following the arrest of the defendant, February 3, 1972, he and Deputy Walker took the defendant from County jail to the U. S. Marshal's office to be processed. After processing, as they were going down the elevator to take the defendant to City jail, Deputy McCue was holding a bathrobe. It was swinging and hitting Deputy McCue in the leg and the deputy felt something inside of the clothing. They then returned to the marshal's office where the clothing was examined and found to contain cocaine, marijuana, and hashish (Motion pp. 72-77).

Mr. Vaughn was briefly recalled and stated that he left the luggage in the baggage room and that said room was accessible to the public (Motion pp. 78-79).

The motion to suppress was overruled (Motion p. 79).

Thereafter, on May 1, 1972, a jury-waive trial was held in Court No. 4, Honorable H. Kenneth Wangelin presiding. The court stated that he would leave motion to suppress open, and if any additional evidence appeared during the course of the trial, that would be heard in conjunction with the motion to suppress.

Several witnesses' testimony was stipulated to. It was stipulated that Mrs. Gloria Beihtol would testify that she was a ticket agent for TWA in Los Angeles, and that on February 2, 1972, she sold a one way ticket to a gentleman who requested a ticket reserved in the name of Mr. Page. That when she asked for identification the defend-

ant was unable to produce any, so she notified Mr. Tayman, public relations man, and Mr. Speiss, deputy U. S. Marshal, to double check on him. It was further stipulated that after being denied flight, he cashed in the ticket. At no time did he tell this woman that he was transporting a pistol (T. 6-8, A. 18).

It was further stipulated that the testimony of Mr. Tayman would be that he was a TWA agent, and that pursuant to a conversation with the defendant, he received the claim check number of a certain piece of luggage (T. 7-9, A. 18).

It was further stipulated that William G. Spiess would testify that he was a Deputy U. S. Marshal and that on February 2, 1972, the defendant was denied boarding on flight 136 from Los Angeles to St. Louis (T. 10-13, A. 19-20).

It was further stipulated that a Mr. Beeman would state that the defendant at a later time between 10:00 A.M. and 12:25 P.M. returned to the customer's service counter and purchased a ticket on flight 194 under the name of William Echols. At that time the defendant identified himself with a student identification card from Pepperdine College and a Southern California auto club card (T. 13-14).

It was further stipulated that at no time did the defendant ever inform anyone of the contents of his luggage (T. 15).

It was further stipulated that Joseph Richwein would testify that he was a deputy U.S. Marshal and assigned to Lambert International airfield in St. Louis as part of the new federal hijacking program. It was stipulated that he would testify that at approximately 3:45 P.M. on February 2, 1972 he and deputy U.S. Marshal Walker received a call to contact the TWA baggage man. Upon

arrival TWA agent Vaughn showed them a travel bag. There was a .357 Magnum revolver and a box of .357 ammunition in the bag. Deputy Richwein also testified as to conversations between himself and Vaughn. It was further stipulated that the defendant was arrested as he exited from flight 194 from Los Angeles, and after being advised of his constitutional rights, identified the bag and gun as his (T. 16-17).

The government then proceeded to present their case. The first witness for the government was David Gentry who testified that he was director of customer service for TWA, and that on February 2, 1972, he was working flight 136 from Los Angeles to St. Louis. He testified that a few minutes before 10:00 A.M. he was in Los Angeles International airport when he was advised by Mr. Kent Tayman that they were going to deny boarding to a passenger. Mr. Tayman then gave Mr. Gentry the claim check number for the luggage of the above passenger. Thereafter Mr. Gentry took flight 136 to St. Louis and arrived approximately 3:05 P.M. Mr. Gentry then went to Mr. Vaughn and explained that the owner of the baggage with claim check number 761905 had been denied boarding in Los Angeles and asked him to locate the described luggage. Thereafter the bag was located and brought back to the baggage room where the bag was opened. In response to questions involving the identifiability or non-identifiability of the bags the following occurred:

Q. Well, who did you give it to? Vaughn?

A. I gave the information in St. Louis of the baggage numbers to Vaughn.

Q. To Vaughn. You had the baggage check numbers in your possession, right?

A. I had the numbers (T. 37).

Q. Nobody told you to go inside the bag or anybody else that you know to go inside the bag and search it, right?

A. No one told me to go inside the bag and search.

Q. This bag was not lost, you had the claim number, right?

A. I had the claim check numbers, right.

Q. And you knew at the time you came to St. Louis that the claim check number you had fitted this bag, right?

A. It was supposed to have (T. 37).

Mr. Gentry stated that when the bag was opened Mr. Vaughn stated, "here is a gun." Mr. Gentry stated he did not specifically see where the gun was and that he was more interested in getting flight back to Los Angeles (T. 43-46, A. 25).

The next witness for the government was Dennis Robert Moriarty who was a special agent for the Bureau of Narcotics and Dangerous Drugs. Mr. Moriarty testified that certain drugs were received by the laboratory and analyzed and found it contained 187 grams of cocaine, 8 grams of cocaine, 8 grams marijuana, and .72 grams of hashish. Mr. Moriarty stated that the cocaine in this case was of extremely high quality, and that the values on the illegal market were $200,000.00 for the cocaine, $10.00 for the hashish, and $15.00 for the marijuana (T. 46-70, A. 25-28).

The next witness was Mr. Terry Vaughn who stated that Mr. Gentry had given him certain number which corresponded to a tag on a brown large suitcase. That they then went into a small office and placed the bag on a desk. In regard to the instructions in the state of mind of the witness at the time of the opening of the bag the following transpired:

Q. Did he say anything about this bag, what to do with it?

A. He just said that the passenger had been refused and that the bag had been requested to be picked up.

Q. Okay. In other words——

A. In other words, retained by us.

Q. Right. In other words, you had the numbers that corresponded and you knew the bag belonged to somebody in Los Angeles, right?

A. It belonged to somebody.

Q. It wasn't lost or abandoned, correct? . . .
Is that correct?

A. Repeat the question, sir.

Q. Your state of mind was such that this bag was not lost or abandoned, correct? You matched the numbers up, Mr. Gentry told you that the man who owns the bag has missed the flight in Los Angeles, is that correct?

A. It belonged—from what he told me the bag belonged to the passenger who had been refused at the gate.

Q. Right, and that Mr. Gentry told you that word had come from Los Angeles as to what to do with this bag, correct? . . .

A. There were no instructions other than the fact that I had been told to pick up and hold the bag.

Q. And hold the bag?

A. Until the passenger showed up for the bag or some further notice was given.

Q. Now, did you open this bag?

A. Yes, sir, I did (T. 73-74).

It was further stated that Mr. Vaughan had keys which should open most bags, and Mr. Vaughn stated that he opened Mr. Echols' bag with one of these skeleton keys. Upon further cross-examination the following transpired:

Q. If I came from Los Angeles to St. Louis and I had $10,000.00 in my bag and I stopped off to get a drink for an hour, would you open my bag?

A. Not necessarily.

Q. So it's possible, correct?

A. If you had been refused on a flight for security reasons there would be a good chance I'd open it, yes (T. 77).

The witness said that he opened up the bag and laid it out flat, and then proceeded to open up a zipper on a compartment therein that was marked "ties", and that inside of this enclosed compartment he found the pistol involved, and further more, that the pistol was no way visible until after this special compartment or pocket was unzipped. At that time Mr. Vaughn called the U.S. Marshal. Thereafter, he continued looking through the bag and found the ammunition. Three U.S. marshals arrived, Marshal Reichwein, Marshal McQue, and Marshal Walker, and Marshal Reichwein retrieved the weapon out of the bag and unloaded it (T. 69-91).

The next witness was U.S. Marshal Robert Walker who stated that on February 2, 1972 he was stationed at the Lambert Municipal airport, and received a page from the baggage clerk to go to the baggage office. When he arrived in the baggage office he saw an opened suitcase on the floor, and that Deputy Reichwein removed the gun therefrom. He further stated that he did not see the gun until such time as it was removed (T. 91-98).

The next witness was Joseph Reichwein who stated that he was a Deputy United States Marshal and that on February 2nd he was assigned to Lambert airfield. That he went to the baggage room and there saw a suitcase with a butt of a gun sticking out of a zippered portion of a pocket. That he removed said weapon from the suitcase. That thereafter at approximately 5:34 P.M. he arrested

one William Echols as he got off a flight that had just landed (T. 98-104).

Thereafter the court granted leave to both sides to file memorandum and continued the case from time to time. On June 15, 1972 the court found the defendant guilty of all counts, and referred the case to the probation officer for a pre-sentence investigation.

Thereafter on September 15, 1972 the court sentenced the defendant in conjunction with Title 18 chapter 311 Section 4208 (B) to the custody of the Attorney General for study and treatment, and ordered the director of the Bureau of persons to furnish this court with the results of said punishment within three months of the date therein. At this time the defendant timely filed an appeal.

REASONS FOR GRANTING CERTIORARI

I

Was There a Valid Search?

A. **Private or governmental search.**

The government relies on the proposition that this was a private search by TWA and not a governmental search and rely on the case of **Burdeau v. McDowell**, 256 U.S. 465, 41 S.Ct. 574 (1921) which was a case in which the former employer of the defendant, searched the defendant's safe, ostensively to reclaim their own property from the defendant. While the majority stated that this was a private search, and the fourth amendment only protected against improper searches by the government, there was a strong dissent by Justices Holmes and Brandeis which reads as follows:

> "Plaintiff's private papers were stolen. The thief to further his own ends, delivered them to the law officer of the United States. He, knowing them to have been stolen, retains them for use against the plaintiff. Should the court permit him to do so?
>
> That the court could restore the papers to the plaintiff if they were still in the thief's possession is not questioned. That it has the power to control the disposition of these stolen papers, although they have passed into the possession of the law officer, is also not questioned. But is said that no provision of the constitution requires their surrender and that the papers could have been subpoened. This may be true. Still I do not believe that the action of a public official is necessarily lawful because it does not violate constitutional prohibitions and because the same result might have been obtained by other and proper

means. At the foundation of our civil liberty lies the principle which denies to governmental officials an exceptional position before the law and which subjects them to the same rules of conduct that are commands to the citizen, and in the development of our liberty insistence upon procedural regularity has been a large factor. Respect for the law will not be abandoned by resort, in its enforcement to means which shock the common man's sense of decency and fair play."

The principle that the government cannot do by subtrafuge what they could not do directly was strengthened by **Lustig v. United States**, 388 U.S. 74, 69 S.Ct. 1372 (1949). In that case a search was made by local police. After the initial search the police called in a federal officer, who the court clearly stated "was not the moving force of the search". The federal officer then seized that evidence discovered by the local police which might be instrumental to convict on a federal charge. In holding the search and seizure invalid, the court recognized ". . . search is a functional, not merely a physical, process. Search is not completed until effective appropriation, as part of an uninterrupted transaction, is made of illicitly obtained objects for subsequent proof of an offense . . ." The court stated the seizure by the Federal officer was not severable from the search by the local police.

Benanti v. U.S., 355 U.S. 96, 78 S.Ct. 155 (1957) held that the federal government was prohibited from using an illegal state wiretap.

A case very close to the instant case is **Corngold v. U.S.**, 367 F.2nd 1 (9th Cir. 1966). In that case, TWA officials made a search of defendant's luggage, purportedly under a TWA regulation. In invalidating the search, the court held that the search was merely a governmental subtrafuge.

"The fruits of a search conducted in and of a federal statute, as this one was, are inadmissible when the search fails to meet fourth amendment standards . . . The search was in substance a federal search, cast in the form of a carrier inspection to enable officers to avoid the requirements of the fourth amendment. Judge William E. Orr's statement in **Toglavore v. U.S.**, 291 F 2nd 262, 266 (9th Cir 1961) "the violation of a constitutional right by a subtrafuge cannot be justified, and the circumstances of this case leave no other inference than this is what was done . . ." though made in a different factual context is plainly applicable.

. . . As the Supreme Court said in Byers v. U.S., 273 U.S. 28, 33-34, 47 S. Ct. 248, 250, 71 L.Ed. 520 (1927) "The fourth amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and the Colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction or equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right . . . (citations omitted.)

In the instant case, see page 77 of the transcript, Terry Vaughn, the TWA official, indicated the only reason he conducted the search was because of possible violation of F.A.A. regulations. Because of this, the TWA employee was acting in a federal police function, trying to ferret out violation of federal laws and regulations. In fact, the federal law puts the responsibilities on the carrier. Therefore, the officer was acting in a very limited quasi-governmental position. This position placed upon him the obligation of having to comply with the 4th amendment.

B. **Necessity for search warrant.**

Faubion v. U.S., 424 F. 2nd 437 (10th Cir. 1970), was a case where the defendant told the officer there were guns in his luggage. The courts held at the most this did was give probable cause to go to a magistrate and obtain a search warrant and this did not give officers authority to search.

C. **Was the search justified under TWA regulations.**

As stated in **Corngold v. U.S.**, supra, a private regulation cannot be used as a subterfuge to obtain an otherwise illegal search. To test this in this case, we must look to the facts. The regulation in question was titled "lost and found" and states "a search of the contents will be made to establish possible ownership and contact." At the time of the search there was no question of this baggage being either "lost" or no question of ownership. This luggage was marked with baggage check No. 761905. It was the baggage of a specific individual who was denied passage in California. Mr. Kent Tayman came to St. Louis with this baggage from California.

In fact, on transcript page 77 Mr. Vaughn stated that there was a "good chance" he would have opened the baggage anyone who was refused a flight for security reasons. It is obvious the regulation relied on by the government was not applicable in this case, in that there was no lost baggage, and the true purpose of the search was something other than this regulation.

D. **Was this property abandoned?**

In its pre-conviction memorandum the government urged that this was abandoned property. Under the facts, this proposition is absurd. See **Corngold v. U.S.**, supra.

II

Was the Subsequent Search and Discovery of the Cocaine Invalid and "Fruit of the Poisoned Tree."

If the original search of the baggage was improper for reasons above stated, then the subsequent arrest and all facts arising from that arrest are also illegal. Therefore, if the defendant was arrested on the basis of an illegal search and seizure, the later discovery while processing his clothing would have been mere "fruit of the poisoned tree". **Wong Sun v. United States**, 371 U.S. 471 (1963).

III

Was There Evidence of "Intent to Distribute"?

The defendant is charged with violation of Title 21, U.S. Code, Section 841 (a) (1), Possession with the intent to distribute Cocaine. The Government only shows at the most mere possession and there is no showing of any intent to distribute.

The former section covering this offense was Title 21, U.S. Code, Section 174 which contained the following language:

"Whenever on trial for violation of this section, the defendant is shown to have or to have had possession of a narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

On October 27, 1970, Congress enacted Public Law 91-513, referred to as the "Comprehensive Drug Abuse Prevention and Control Act of 1970", which was a complete revision of all former federal statutes pertaining to narcotics and dangerous drugs. The revised law under which

the defendant is charged does not contain any language of a presumption. However, even under the old language, the Government did not sustain their burden of proof. While the prior section contained a presumption dealing with "trafficking" in narcotics, it was held that the presumption only allowed a finding of two elements: (1) that the drug was illegally imported into this country, and (2) that the defendant had knowledge of such illegal importation. **Ventimigilio v. U.S.**, 61 F. 2nd 619 (6th Cir. 1933); **U.S. v. Laundry**, 257 F. 2d 425 (7th Cir. 1958); **U.S. v. Somohano**, 193 F. Supp. 201 (U.S. Dist. Ct. Conn. 1961). Then in **Turner v. U.S.**, 396 U.S., 398, 90 S.Ct. 642 (1970), the United States Supreme Court held that the presumption did not apply to cocaine because there were various legal manufacturers of cocaine in this country, and, therefore, there was no factual basis to presume that the drug was illegally imported.

The Government stresses the large quantity of cocaine seized and would contend that this would create a circumstantial case for possession with the intent to distribute. The defendant has searched the cases and has been unable to find any case where quantity alone has been held sufficient to show intent to sell. In **Ezzard v. U.S.**, 7 Fed. 2nd 808 (1925) the defendant had in his automobile a trunk containing 105 ounces of morphine and 3 ounces of cocaine, a very large amount, the court held there was no evidence that he was a "wholesale dealer" within the meaning of the statute, and while dealing with a slightly different problem the appellant would urge this court to look at **Sykes v. U.S., U.S. v. Ruffin**, 312 F2nd 232 (8th Cir. 1963) a case dealing with transportation of narcotics. In that case the informer and the defendant came to St. Louis by Greyhound bus. That thereafter the Federal agent kept surveillance of the defendant until he entered the Pruitt Igoe housing project where they lost sight of

them. Shortly thereafter they raided an apartment in which the defendant was in and found narcotics. The court reversed the conviction holding there was no evidence that he illegally brought the narcotics from Chicago.

> "Forced with the dilemma of not being able to establish by direct evidence that narcotics were transported, the Government takes the position that the facts and circumstances above related are sufficient to support an inference that Ruffin committed the offense which is the subject of Count I of the information. We are not so persuaded. The principle is firmly established that unless there is substantial evidence excluding every other hypothesis but guilt, a submissible case is not made, and, where all evidence is as consistent with innocence as with guilt, the reviewing court must reverse a judgment of conviction . . ."

As previously stated there is absolutely no showing whatsoever of what Mr. Echols intended to do with the cocaine that was found in his possession. The case merely shows that certain cocaine was in a suitcase which he brought from California. Therefore, his conviction should be reversed.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for Writ of Certiorari should be granted.

Respectfully submitted

JAMES A. BELL

ALLEN I. HARRIS
1023 North Grand
St. Louis, Missouri 63106
JEfferson 3-1776

DAVE SHINN
4676 Admiralty Way
Marina Del Rey, California

Attorneys for Petitioner

APPENDIX

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 72-1577

UNITED STATES OF AMERICA,

Appellee,

v.

WILLIAM ECHOLS, a/k/a STEVE PAGE,

Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: March 16, 1973

Filed: April 20, 1973.

Before MATTHES, Chief Judge, ROSS and STEPHENSON, Circuit Judges.

MATTHES, Chief Judge.

We are again confronted, as we were in *United States v. Burton*, _____ F.2d _____, March 19, 1973, with a controversy over the warrantless search of the luggage of an airline passenger and the question whether contraband found incident thereto was improperly admitted into evidence.

A three-count indictment charged that appellant, also known as Steve Page, (1) knowingly delivered to Trans World Airlines (TWA), a common carrier, a travel bag containing a Smith & Wesson model 19-2 .357 magnum loaded revolver and a box of cartridges for shipment in interstate commerce from Los Angeles, California to St. Louis, Missouri, in violation of 18 U.S.C. § 922(e); (2) knowingly and intentionally possessed with intent to distribute 200.45 grams of cocaine in violation of 21 U.S.C. § 841(a) (1); and (3) unlawfully, knowingly and intentionally possessed 18.17 grams of marihuana in violation of 21 U.S.C. § 844(a).

The undisputed evidence on the motion to suppress, which was considered both before and during trial, revealed these relevant and operative facts.

On February 2, 1972, at approximately 9:50 a.m. (PST), appellant, using the assumed name of Steve Page, purchased in Los Angeles, California a one-way ticket for TWA Flight # 136 which was scheduled to depart from Los Angeles at 9:55 a.m. and arrive in St. Louis at approximately 3:05 p.m. (CST). Appellant was unable to produce any identification upon the request of the ticket agent. Thereupon the latter informed the TWA Public Relations Representative of appellant's failure to furnish identification. The TWA representative would not permit appellant to board Flight # 136 because appellant's behavior comported with the Federal Aviation Administration security profile and for the additional reason that he could not produce identification. Appellant informed the TWA representative that a brown "Lark" travel bag had already been placed on the aircraft for transportation to St. Louis. Appellant produced the baggage check number and the representative made a record thereof.

David M. Gentry, Director of Customer Service for TWA, accompanied Flight # 136 in order to provide service to passengers in flight and after deplaning. The flight departed

from Los Angeles and arrived in St. Louis as scheduled. Gentry and Terry Vaughn, TWA Customer Service Agent at St. Louis, discovered appellant's unclaimed luggage bearing the claim check number which had been furnished to Gentry. The unclaimed travel bag was opened by Vaughn for the alleged purpose of identifying the owner so that the bag could either be returned to him or held for his arrival in St. Louis. Upon opening the travel bag, the magnum revolver and box of cartridges described in the indictment were found in the tie compartment. Thereupon, a deputy United States marshal was alerted and upon examination he, too, observed the revolver and cartridges and seized both.

In the meantime, appellant, sometime before 12:25 p.m. (PST), surrendered his ticket for Flight #136, secured a refund, and purchased a ticket under his correct name for TWA Flight #194. On this occasion, appellant produced two identification cards.

Flight #194 arrived at the St. Louis airport at approximately 5:35 p.m. (CST). After deplaning, appellant was met in the air terminal area by a deputy United States marshal and placed under arrest.

On February 3, 1972, appellant was taken to the office of the United States marshal in the United States Court House in St. Louis for processing and investigatory purposes. While on an elevator, one of the deputy marshals, who was carrying a bathrobe belonging to appellant, discovered that the robe contained a rather sizeable bulge. Upon further exploration, the deputy marshal found plastic bags containing cocaine and marihuana, the subjects of Counts I and II, in the lining of the bathrobe. An analysis revealed a quantity of 187.65 grams of high purity cocaine, possessing a strength of 14.17%, an additional 12.8 grams of very pure cocaine of 63.5% strength, 17.45 grams of marihuana, and .72 grams of hashish. A special agent of the Bureau of Narcotics and Dangerous Drugs testified that the cocaine had a value of approximately $200.000.

The district judge sentenced appellant to the custody of the Attorney General or his authorized representative for treatment and study pursuant to 18 U.S.C. § 4208(b) and ordered that the Director of the Bureau of Prisons furnish the court with the result of the study within three months in order that the court might consider further disposition of the case.

As long ago as 1921, in *Burdeau v. McDowell*, 256 U.S. 465, the Supreme Court ruled that the provision of the fourth amendment forbidding unreasonable searches and seizures applied only to governmental action, and not the actions of private individuals. The holding in *Burdeau* has been recently cited with approval in *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971). Appellant, conceding that his travel bag was opened and searched by an agent of the airline; seeks to circumvent the private label by contending that the TWA employee was acting at the behest or in the capacity of a federal official.

Our recent case of *United States v. Burton, supra*, in which this court confirmed the private character of an airline search, is dispositive of the present case. In that case, defendant purchased an airline ticket and, at the same time, checked two bags for flight. The ticket agent, suspicious because defendant fit the security profile, and the weight distribution of one of his bags seemed unusual, searched the bag and found a gun. A federal marshal was notified, and defendant arrested.

In *Burton*, we recognized the general rule that searches of packages or luggage by airline employees are invulnerable to fourth amendment attack so long as the search is conducted by the carrier for its own purposes and without the instigation or participation of government agents. *Clayton v. United States*, 413 F.2d 297 (9th Cir. 1969) cert. denied, 399 U.S. 911 (1970); *Wolf Low v. United States*, 391 F.2d 61 (9th Cir.), cert.

denied, 393 U.S. 849 (1968); *Gold v. United States*, 378 F.2d 588 (9th Cir. 1967); *Corngold v. United States*, 367 F.2d 1 (9th Cir. 1966); *United States v. Blum*, 329 F.2d 49 (2d Cir.), cert. denied, 377 U.S. 993 (1964). In the present case the search of appellant's travel bag was conducted solely by a TWA employee for the purpose of obtaining identification of the owner of the luggage. The employee was acting pursuant to a TWA regulation authorizing the precise conduct in which he was engaged. There is not a scintilla of evidence that any government agent requested that the search be made, was present when the travel bag was opened, or had any knowledge concerning the activity until after the gun had been discovered. In sum, we hold that the district court properly denied appellant's motion to suppress and permitted the magnum revolver, ammunition, and packages of drugs to be introduced into evidence.

There remains for consideration the contention that the government failed to show that appellant possessed an intent to distribute the cocaine. 21 U.S.C. § 841(a) (1). This claim is without substance and does not merit extensive discussion.

Confronted with an identical question, the fifth circuit reasoned, "The question of the validity of the inference turns on whether the amount of cocaine was such as will support an inference of intent to distribute as distinguished from mere possession for personal use." *United States v. Mather*, 465 F.2d 1035, 1037 (1972). In that case, the court decided that possession of 197.75 grams of cocaine worth $2,500 delivered was sufficient to justify the inference. Here, appellant possessed 199.73 grams worth $200,000. The record does not reveal whether appellant was an addict, nor could his counsel enlighten us on this matter at oral argument. See also *United States v. Ortiz*, 445 F.2d 1100 (10th Cir.), cert. denied, 404

U.S. 993 (1971); *United States v. Cerrito*, 413 F.2d 1270 (7th Cir. 1969), cert. denied, 396 U.S. 1004 (1970).

We conclude that the case was in all respects properly decided and hence we affirm.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.